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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 674

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. i) and the supplemental opinion (Pet. App. x) are reported, respectively, at 174 F. Supp. 663 and 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. xii) is reported at 294 F. 2d 179.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961. The petition for a writ of certiorari was filed on January 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusivity provision of the Federal Employees' Compensation Act precludes petitioner from recovering from the United States one half of its tort liability to a government employee injured in the mutual fault collision between petitioner's vessel and the government vessel.

STATUTES INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> 5 U.S.C. 751(a)—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> 5 U.S.C. 757(b)—The liability of the United States or any of its instrumentalities under sections 751–756, 757–781, 783–791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury

or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

This is a suit in admiralty brought in the United States District Court for the Northern District of California on cross-libels by petitioner and the United States arising out of a collision between the petitioner's vessel, the SS F. E. WEYERHAEUSER and the United States Army Dredge PACIFIC off the coast of Oregon (R. 3, 16).[1]

The only personal injury arising out of the collision was to Reynold Ostrom, a civil service employee of the government serving aboard the PACIFIC; he was within the coverage of the Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.* Ostrom collected $329.01 from the United States under the provisions of that Act as compensation for his injury (R. 72). Ostrom then filed a separate action against petitioner to recover general damages for his injuries (R. 73). In that suit, which was commenced in a Washington state court and removed to the United States District Court for the Western District of Washington, petitioner moved to implead the United States, seeking indemnity or contribution from the government for any amounts which petitioner might be held liable to pay to Ostrom. This motion was denied (R. 105–

[1] Cargo insurers filed a libel in intervention against the United States (R. 23).

106). Subsequently, Ostrom and petitioner settled their suit for $16,000, and the United States stipulated that this was a reasonable settlement (R. 68).[2] Subsequently, Ostrom reimbursed the United States for the $329.01 paid as compensation.

In the present case, in its decision on liability entered on July 2, 1959, the district court found that the collision was caused by the mutual fault of the two vessels (R. 63). The court also held that each party was entitled to recover from the other one-half of all provable damages and court costs sustained as a result of the collision, according to the admiralty law in cases of mutual fault collisions (R. 63).

Thereafter, the parties entered into a stipulation respecting the amount of damages, and the only real issue remaining was whether in apportioning damages the United States must contribute to petitioner's settlement with Ostrom (R. 69). The district court held that the $16,000 paid by petitioner in settlement of Ostrom's claim was an item of provable damage to which the United States must contribute in the overall apportionment of damages (R. 73).

On the government's appeal, the court of appeals reversed and remanded with directions to recompute damages without any allowance for the $16,000 paid on Ostrom's claim (Pet. App. xxv). This decision was rested upon the court's construction of 5 U.S.C. 757(b), *supra*, pp. 2–3, by which the government's liability to pay compensation to its employees is made exclusive.

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[2] All other defenses and claims of petitioner and the United States were reserved.

ARGUMENT

The decision of the court of appeals is not in conflict with the decisions of this Court or of other courts of appeals. On the contrary, this is the first appellate construction of the exclusivity provision in the Federal Employees' Compensation Act in terms of its application to a third-party claim against the government arising out of a mutual fault collision at sea resulting in injury to a government employee aboard a government vessel. In view of the plain terms and purpose of the Compensation Act, the decision below is correct and there is no occasion for further review by this Court.

1. On the basis of the language of the Federal Employees Compensation Act, the Congressional intent and policy of the statute, and decisions construing the comparable provisions of the analogous Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905 (all of which the court below considered), the decision in this case is correct.

(*a*) It has been established by this Court that the Federal Employees' Compensation Act is the exclusive remedy for civilian seamen in the employ of the United States injured in the performance of duty on government vessels. *Patterson* v. *United States*, 359 U.S. 495; *Johansen* v. *United States*, 343 U.S. 427. See also *Posegate* v. *United States*, 288 F. 2d 11 (C.A. 9); *Smither & Co., Inc.*, v. *Coles*, 242 F. 2d 220 (C.A. D.C.), certiorari denied, 354 U.S. 914; *Underwood* v. *United States*, 207 F. 2d 862 (C.A. 10); *Sasse* v. *United States*, 201 F. 2d 871 (C.A. 7); *Lewis* v. *United*

States, 190 F. 2d 22 (C.A.D.C.). By the express terms of that Act (5 U.S.C. 757(b)), the compensation payable to the employee is "exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death, * * * under any Federal Tort liability statute." *supra,* pp. 2–3.[3] This statutory language precludes not only direct tort liability by the United States for the injuries of a government employee but also indirect liability through a third person. To avoid doing violence to the specific words Congress used, the statute must be read as barring *any* right flowing from the compensable injury. *Smither & Co., Inc.* v. *Coles,* 242 F. 2d at 224 (C.A.D.C.). Moreover, the policy and purpose of statutory compensation schemes is, as stated by this Court in *Bradford Electric Co.* v. *Clapper,* 286 U.S. 145, 159, to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." A holding which would permit petitioner to recover would depart from the language of the Federal Employees' Compensation Act and subvert its purpose and policy.

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[3] This section was enacted in 1949 as an amendment to the Federal Employees' Compensation Act for the purpose of making it clear "that the right to compensation benefits under the act is exclusive *and in place of any and all other legal liability of the United States or its instrumentalities* * * *" S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. (Emphasis added.)

(*b*) To our knowledge *Christie* v. *Powder Power Tool Corp.*, 124 F. Supp. 693 (D. D.C.), is the only reported decision denying, on the basis of Section 757 (b) of the Federal Employees' Compensation Act, a third-party claim for contribution, but the authorities under Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, which is virtually identical to Section 757(b) of the Federal Employees' Compensation Act,[4] preclude recovery from the employer in similar circumstances on the ground that a third-party tortfeasor's claim against an employer for contribution is barred by Section 5.[5] The decisions point out that the employer surrenders his right to utilize common law defenses and in return gains an absolute, but limited, liability to his injured employee in the place of possible liability without limitation. As succinctly put

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[4] Section 5 of the Longshoremen's Act provides in pertinent part that "the liability of an employer [for compensation] shall be exclusive and in place of all other liability * * * to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

[5] See *Brown* v. *American-Hawaiian SS Co.*, 211 F. 2d 16 (C.A. 3); *Crawford* v. *Pope & Talbot*, 206 F. 2d 784 (C.A. 3); *Lo Bue* v. *United States*, 188 F. 2d 800 (C.A. 2); *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322 (C.A. 2); *Baird* v. *John McShain, Inc.*, 108 F. Supp. 553 (D. D.C.); *Coates* v. *Potomac Elec. Power Co.*, 95 F. Supp. 779 (D. D.C.); *Liberty Mut. Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17 (D. D.C.); *Johnson* v. *United States*, 79 F. Supp. 448 (D. Ore.); *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Ruckert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304; and see 2 Larson, *Workmen's Compensation Law*, § 76.21; 53 A.L.R. 2d 977.

by the Second Circuit in *American Mutual Liability Ins. Co.* v. *Matthews, supra* (182 F. 2d at 324):

> To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees.

The similarity in the language and purpose of the Longshoremen's Act and the Federal Employees Compensation Act require that the result reached in the cases under Section 5 of the Longshoremen's Act should also obtain here.

2. The fact that this is an admiralty case in which the rule of divided damages applies does not mean that the exclusivity provision of the Compensation Act must be disregarded. The rule of divided damages is still applicable to the mutual fault collision between petitioner's vessel and that of the government, but what the court below decided is that, in arriving at the total damages to be divided, petitioner cannot include as an element an amount representing its tort liability to an employee of the government subject to the Federal Employees' Compensation Act. Contrary to petitioner's argument, this decision is in no way inconsistent with the ruling in *The Thekla,* 266 U.S. 328. That case, which arose before the passage of either of the Suits in Admiralty Act[*] or the Public

[*] 46 U.S.C. 741, *et seq.*

Vessels Act[7] was concerned with the question whether any affirmative relief could be had against the United States in a mutual fault collision. That point is not in issue here. Neither in the *Thekla,* nor in any other case cited by petitioner, is there anything to indicate that Congress does not have the power to limit the government's liability for the injury or death of its employees to the amount specified in the Compensation Act, and to provide that neither directly nor indirectly shall the government be liable for any greater amount on a claim growing out of such injury. To the extent that the position of the court of appeals may be said to rest upon concepts of sovereign immunity (Pet. App. xix), it is solely with relation to the express provisions of the Compensation Act which limit what might otherwise be the suability and liability of the United States in admiralty.

Petitioner argues (Pet. 7), however, that it was the intent of the Public Vessels Act, 46 U.S.C. 781, *et seq.,* that the United States be liable just as a private ship owner under admiralty principles, and since private ship owners must contribute to personal injury payments in collision cases, the government should also be so liable, notwithstanding the contrary provisions of the Federal Employees' Compensation Act. This would create an exception to the compensation statute in maritime tort cases, although the language of the Compensation Act permits of no exception. In specific terms, 5 U.S.C. 757(b) precludes the imposition of liability on the United States "under

[7] 46 U.S.C. 781, *et seq.*

any Federal Tort Liability statute"—including the Public Vessels and Suits in Admiralty Acts. And as this Court held in *Johansen* v. *United States*, 343 U.S. 427, 441, Congress "should not be held to have made exceptions [to the Federal Employees' Compensation Act] without specific legislation to that effect."[8]

3. The decisions of this Court upon which petitioner relies in an effort to show a conflict are inapposite. Petitioner acknowledges (Pet. 11) that this Court's ruling in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, turned upon an express contract, but the petition appears to imply that, with respect to the two remaining cases cited,[9] there was no contractual relationship between the parties. This is not correct. The recovery permitted to the third party from the employer was in all three cases based on an indemnity theory resting upon a contractual right.

Likewise, petitioner's reliance (Pet. 13) upon the Court's decisions in the Harter Act[10] cases is misplaced. In *The Chattahoochee*, 173 U.S. 540, the Court held that in a mutual fault collision the cargo-carrying vessel must share the non-carrying vessel's

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[8] By the same token, petitioner's assertion (Pet. 8) that the Compensation Act is to be construed as barring only claims by the employee (and his dependents) must fail. The cases cited by petitioner on this point (Pet. 9) were decided under state laws and permitted recovery against the employer by third persons on an indemnity theory.

[9] *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, and *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423.

[10] 46 U.S.C. 190, *et seq.*

liability for cargo damage, notwithstanding a provision of the Harter Act (46 U.S.C. 192) which relieved the carrying vessel from liability for loss or damage to cargo due to errors in navigation or management of the vessel. As the court below noted in its opinion (Pet. App. xxv), the clear distinction is that the Harter Act was not intended to affect the liability of one vessel to another in a collision case. The rule of *The Chattahoochee* is therefore inapplicable where, as here, the statute makes the exclusive liability of the employer that of paying compensation to its employee, and specifically excludes liability to anyone else who might otherwise be entitled to recover from the United States. See *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 (C.A. 2), *supra.*

Neither is there validity in petitioner's contention that there is a true conflict with *United States* v. *The SS Washington,* 172 F. Supp. 905 (E.D. Va.), affirmed, 272 F. 2d 711 (C.A. 4), on the district court's opinion. Petitioner's claim—that the argument advanced by the United States in the instant case was rejected by the Court of Appeals for the Fourth Circuit in the *Washington* case—is inaccurate. The critical question in the earlier case was not one of contribution, but whether the government could offset, against the claim of the Texas Company, veterans' benefits paid to survivors of soldiers killed in the collision between the *U.S.S.* RUCHAMKIN and *SS* WASHINGTON. This is clear from the first paragraph of Judge Bryan's

opinion in which he states the issues before him (172 F. Supp. at 907):

> The questions now before the court * * * are * * * (d) whether against the *admitted right of The Texas Company to reimbursement from the Government for one-half of the death awards as collision damages,* the United States may offset the sums paid and payable by the Government to the decedents' dependents as statutory death gratuities, indemnity and compensation. [Emphasis added]

Thus, the right of the Texas Company to contribution was, in the circumstances of that case, admitted in the trial court.

Furthermore, the veterans' benefits statutes there involved did not contain a provision like 5 U.S.C. 757(b), which in very specific terms makes the liability of the government exclusively one to pay compensation. It is obvious, therefore, that the district court in the *Washington* case cannot be said to have rejected the government's position or arguments in the instant case, which rest so largely on the exclusivity provision of 5 U.S.C. 757(b).

It is true that in the *Washington* case, in the court of appeals, the United States sought to raise the issue as to whether, in the light of *Feres* v. *United States,* 340 U.S. 135, and *Patterson* v. *United States,* 359 U.S. 495, the Texas Company had any right to fix upon the United States one-half of its liability to the death claimants. This argument was made in the face of the apparent admission in the trial court that the Texas Company was entitled to reimbursement from the United States for one-half the death awards.

See *supra*, pp. 11–12. In all probability, the failure properly to raise this issue in the district court explains the affirmance on the opinion of the district court, which, as we have noted, was concerned only with the government's right of set-off.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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